No. 2817

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. SCHOENWALD and S. T. HILLS as Receivers and Assignees of the Pacific Coast & Norway Packing Company, a corporation,

*Plaintiffs in Error,*

vs.

HARRY A. BISHOP, as United States Marshal for the first division of the District of Alaska, and D. N. McDONALD,

*Defendants in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.

# Answer Brief of Defendants in Error

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## STATEMENT OF THE CASE.

The plaintiffs, who are citizens of the state of Washington (P. R. pp. 79, 87, 104, 162), were appointed receivers by the superior court of King

county, state of Washington (P. R. pp. 74, 85, 100, 101, 181, 186), upon petition of one Roy V. Nevin, a creditor (P. R. pp. 78; 85, 86; 103, 104; 161, 162; 177), of the Pacific Coast & Norway Packing Company, a Minnesota corporation (P. R. pp. 1, 198), which appeared in answer to the petition, placed in issue certain allegations of the complaint, and prayed that the action be dismissed and that it recover its costs and disbursements. (P. R. pp. 179, 180.)

On October 26, 1914, the Washington court, upon application of the plaintiffs Schoenwald and Hills, as receivers (P. R. p. 200), it appearing to that court that such conveyance and transfer were necessary to the successful conduct of the receivership (P. R. p. 201), ordered that the corporation convey to said receivers all of its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated, and directed the president of the corporation to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty (P. R. p. 201).

Pursuant to said order (P. R. p. 198), on October 26, 1914, a transfer was made purporting to sell, transfer and set over unto the plaintiffs as receivers of the first party corporation and not otherwise (P. R. p. 198) certain personal property in Alaska, including the power boat "Bernice" (P. R.

p. 199), which vessel, with her furniture, etc., is the property in controversy.

The "Bernice" at all the times in controversy was an American licensed vessel of 11 net tons, documented and licensed in the United States Customs District of Alaska (Answer, P. R. p. 12; not denied, Reply, P. R. p. 23), and was at all times within the jurisdiction of the Alaska court (P. R. 74, 100, 158) and at no time in the state of Washington. (P. R. pp. 74, 85, 100, 158.)

The instrument of transfer was never recorded in the office of the collector of customs for the district of Alaska (P. R. pp. 75, 100, 159); in fact, was never placed of record in any office whatsoever (Finding No. 7, P. R. p. 217).

Defendant McDonald, who is a local creditor of the corporation in Alaska (P. R. p. 88), holding a just claim against the corporation (Ev. Burton, pp. 126, 133, 134; Answer, P. R. p. 10; not denied in Reply, P. R. p. 22), duly commenced an attachment action on January 25, 1915, in the same court that this trial was had in, and caused the vessel, her furniture, etc., to be duly attached by the defendant Bishop as United States marshal at Petersburg, Alaska, and on April 20, 1915, a trial having been had in said attachment suit, McDonald recovered judgment against the corporation, which judgment ordered and adjudged that said vessel be sold to satisfy the demands of said McDonald against said

corporation (Answer, P. R. pp. 10, 11, 12, 13; not denied, Reply, P. R. p. 22). McDonald had no notice of the transfer (Ev. Burton, P. R. pp. 136, 142, 143, 144, 147) and never assented to, or received any benefit under, either the receivership or the conveyance (Finding No. 13, P. R. p. 219).

The case was tried by the court before a jury, but the jury was discharged upon agreement at close of plaintiffs' case (P. R. p. 25), and the court entered judgment for the defendants (P. R. p. 27), from which the plaintiffs prosecute this writ of error.

The question is: Are the plaintiffs entitled to the personal property as against the defendants?

We most respectfully submit that the question must be answered in the negative for the reasons hereinafter mentioned.

## POINTS.

1. Statutory and involuntary assignments for benefit of creditors will be given only such effect in other states as the laws of such state permit, and must give way to claims of creditors pursuing their remedies there.

2. Voluntary or common-law assignments for benefit of creditors will not be respected in other states when they come in conflict with the rights of local creditors, or with the laws or public policy of

the state in which the assignment is sought to be enforced.

3. An unrecorded assignment (for benefit of creditors) of an American vessel is invalid as against a creditor of the assignor who seeks to sequester the property to the satisfaction of his debt.

## ARGUMENT.

### I.

### STATUTORY AND INVOLUNTARY ASSIGNMENTS FOR BENEFIT OF CREDITORS WILL BE GIVEN ONLY SUCH EFFECT IN OTHER STATES AS THE LAWS OF SUCH STATE PERMIT, AND MUST GIVE WAY TO CLAIMS OF CREDITORS PURSUING THEIR REMEDIES THERE.

(*A*) *The conveyance in controversy was not the act of the corporation.*

Plaintiffs admit that there had been no meeting of any kind of the board of trustees or directors or of the stockholders (Dep. Kells, P. R. p. 76; Dep. Steberg, P. R. p. 86; Dep. Smith, P. R. p. 101; Dep. Schoenwald, P. R. p. 160) held for the purpose of authorizing, acquiescing in or ratifying either the receivership proceedings or the conveyance to the plaintiffs, nor any meeting of either directors or stockholders since the annual meeting before the

receivership (Dep. Steberg, P. R. p. 86; Dep. Smith, P. R. p. 101; Dep. Schoenwald, P. R. p. 160).

However, plaintiffs say "the assignment of the Alaska assets stands as the act of the assignor corporation" (Brief, p. 17) and cite authorities which they contend support that view. The distinguishing features of those cases are so different from the features of the case at bar that we do not feel it necessary, in view of controlling cases cited by us *infra*, to point out the distinctions in each particular case, except to say that in some of them the corporation or its minority stockholder was clearly estopped, and in all of them which we have had oportunity to examine the burden was on the person making the attack, and there was no necessity for the person resisting the attack to make out in the first instance a valid or duly authorized title. Moreover, Professor Thompson, whose work on Corporations, Section 6165, was quoted by the court in *Marsters v. Oil Co.*, 90 Pac. (Ore.) 151, as supporting their decision, in later sections of his work (5 Thomp. Corp., Sec. 6478, 6479) lays down the rule with reference to asignments for benefit of creditors which was followed by the trial court in this case.

In the case at bar plaintiffs' entire contention is based upon the fact that they have a good and sufficient title, because the corporation voluntarily and of its own free will and accord, for the benefit of all its creditors, made a good and sufficient deed of con-

veyance to them. (Complaint, P. R. p. 3.) It was upon that title that they relied to make out a case, and to establish such title it became necessary that they prove in the first instance that the assignment was the duly authorized act of the corporation.

2 R. C. L., p. 649;
5 Thomp. Corp., Secs. 6478, 6479, *supra.*

And as stated in *Friedman v. Lesher,* 198 Ill. 21, 64 N. E. 736, 92 A. S. R. 255, at 259, wherein the facts showed: That the president died on June 5, 1896; that the vice-president, who owned 50 out of the total 60 shares of stock, on June 6, 1896, made an assignment for benefit of creditors, which was ratified by the remaining directors on the same day but not before suit had been instituted and judgment entered for Lesher:

> "'Unless otherwise provided by statute, the general rule is that a corporate assignment must be executed by the board of directors, or a quorum thereof, at a meeting duly called for that purpose, or by the president or some other officer of the corporation, as authorized by the directors:' 3 Am. & Eng. Enc. of Law, 2d ed., 24, and cases cited in note 2; 4 Thompson on Corporations, Sec. 4636; *State Nat. Bank v. Union Nat. Bank,* 168 Ill. 519, 48 N. E. 82."

And as stated in *Calumet Paper Co. v. Haskell,* 144 Mo. 331, 66 A. S. R. 425, which was cited by the trial court and wherein the facts were: The corporation had five directors, all of whom were stockholders; on July 8, 1893, the corporation being

insolvent, two of its directors made an assignment for benefit of creditors to Parker as assignee, the other three directors neither being present nor having notice; although there was some evidence to show ratification of assignment by stockholders; plaintiff commenced suit on August 9, 1893, by attachment, and served assignee with garnishee process:

> "Where a creditor elects to disregard the assignment and attaches the property of the corporation, and thereupon a contest arises between him and the assignee, the question is one which concerns the title of the assignee to the property, and it is properly drawn in question in such a proceeding; it is not a question where, in theory of law, the validity of the assignment is subject to collateral attack. But if it were, the rule would be the same; since such an assignment is not a judicial proceeding, and in every case where any person asserts rights under it as against a stranger, the burden is upon him to show at least an assignment valid on its face; and the other party may show that it was invalid by reason of extrinsic facts, as that it was unauthorized by a legal meeting of the directors: 5 Thompson on Corporations, sec. 6478. When such an assignment has not been validated by acquiescence or laches, it may obviously be impeached, either by creditors or stockholders, on the ground that it was not made by the directors at a meeting duly convened, that is to say, on the ground that it was not made by the board of directors at all, for the acts of the directors are of no validity unless they are regularly assembled and acting as a board, and unless the proper quorum has concurred in the action which is challenged: 5 Thompson on Corporations, sec.

6479. The members of the board, severally, could not ratify the assignment, because they could not, in the first place, have made it in their individual capacity, but only as a board, and not otherwise could they ratify it so as to effect this plaintiff."

Plaintiffs offered no evidence whatsoever, either documentary or oral, that the corporation had authorized, acquiesced in or ratified their alleged title, except that the directors at odd times and on haphazard occasions had approved it, and that a large majority of the stockholders had been communicated with, or their representatives informed of it. There is not a scintilla of evidence that the corporation, its directors or its stockholders, acting as such, authorized, acquiesced in or ratified any of these proceedings. The plaintiffs are in the identical situation that the defendants presenting an affirmative defense found themselves in in the case of *Doernbecher v. Col. City Lbr. Co.,* 21 Ore. 573, 28 Pac. 888. The facts in that case were as follows: Suit by judgment creditor of insolvent defendant corporation to enforce individual liability of three defendants, stockholders, for their stock subscribed and unpaid. Answer averred a general assignment by the corporation, prior to the commencement of suit, of all its property for benefit of creditors, and sole right of assignee to collect all monies due for stock subscribed and unpaid. Corporation had five directors, three of whom, without notice to other two, assembled by mutual consent and pretended to pass a reso-

lution authorizing an assignment, which was thereafter made in due form.

Judge Bean, speaking for the court in the case (*Doernbecher v. Col. City Lbr. Co.*), at page 899, 28 Pacific, said:

> "It was urged at the argument that plaintiff could not, in this suit, question the validity of this assignment, because this is in the nature of a collateral attack. It is clear that the creditors as well as the stockholders can impeach the transfer of property by the corporation for want of previous action of the board of directors; but it is sometimes said this cannot be done collaterally, but only by a direct proceeding brought for that purpose. *Eno v. Crooke,* 10 N. Y. 60; *Castle v. Lewis,* 78 N. Y. 131. But on this record it can hardly be said that this is a collateral attack, within the meaning of this rule. Defendants rely solely upon this assignment as a defense to this suit. The plaintiff, therefore, has a right to insist that the proof in their behalf shall show an assignment on its face apparently valid; and this it fails to do, because it affirmatively appears it was not authorized at a legal meeting of the directors. Hence, there is simply a failure of proof, and the defense is not made out."

*(B) A transfer made in a receivership proceedings by a corporation to its receivers pursuant to an order of the court is not a voluntary assignment for the benefit of creditors.*

The records of the receivership court show that the plaintiffs were appointed receivers upon the petition of one Nevin (Dep. Kells, P. R. p. 78; Ex.

A, P. R. p. 177), who was a creditor of the corporation (Dep. Kells, P. R. p. 78; Dep. Steberg, P. R. pp. 85, 86; Dep. Smith, P. R. pp. 103, 104; Dep. Schoenwald, P. R. pp. 161, 162; Ex. A, P. R. p. 177). The corporation did not confess judgment; it did not permit a default to be taken against it; but it appeared and resisted the petition, placing in issue under the sworn verification of its president and treasurer Steberg some of the allegations of the complaint and prayed that the complaint be dismissed and that it recover its costs (Ex. B, P. R. pp. 179 and 180).

The denials in its answer were sufficient to place in issue the allegations of the complaint to which they were directed, for the supreme court of Washington has said:

> "An allegation in an answor that defendant 'has no knowledge or information sufficient to form a belief' is a sufficient denial to put in issue the allegation of the paragraph of the complaint to which it is addressed."

*Colby v. Spokane,* 12 Wash. 693, 42 Pac. 112.

The court to which the petition was addressed, after reciting "upon the verified complaint herein and after argument of counsel for the plaintiff and the defendant Pacific Coast & Norway Packing Company," ordered that Schoenwald be "appointed receiver of *all* the property, assets and business of the" corporation, and that he be "empowered to take possession of and to do all things necessary to

the preservation of the property and assets of the defendant, and continue the business of said defendant (corporation) with full authority to do all things necessary thereto, until the further order of the court, and shall from time to time report to the court his doings hereunder." (Ex. C, P. R. pp. 181, 182.)

It is impossible to view these proceedings as anything other than adversary and involuntary. However, plaintiffs attempt to impeach this their own documentary evidence by oral testimony to the effect that the records of the receivership court are incorrect when they show that plaintiffs were appointed in an adverse suit. We submit that such testimony was incompetent and should not have been admitted, and that it can not have any weight whatever, and that the records themselves are conclusive on the plaintiffs and import absolute verity.

> "A judicial record is conclusive, and can not be controlled by parol evidence."
>
> *Haskell v. Cunningham,* 221 Mass. 49, 108 N. E. 915.

> "A judicial record imports absolute verity, and cannot be impeached by parol testimony."
>
> *In re Bishop,* 149 Ill. App. 491.

See also:

*Chappell v. Chappell,* 89 Pac. (Wash.) 166;
*Nichols v. Doak,* 93 Pac. (Wash.) 919.

The record speaks for itself, showing indisputably that the proceedings were adverse and instituted by a creditor and forced upon the corporation against its wish. A case clearly in point is *Blue Mountain, etc., Co. v. Portner,* 131 Fed. 57, wherein parol evidence of the judge who made the order appointing the receivers was offered to show the grounds of the order. District Judge Purnell, speaking for the Fourth Circuit Court of Appeals, at page 60 of 131 Federal, said:

> "It does not require argument to sustain the position that the order appointing the receivers, being in writing, must speak for itself, and no declaration of the judge who signed it can be given as grounds on which he entered the order. Public records can neither be explained nor varied by parol testimony. They are conclusive, speak for themselves, and imply absolute verity. *Shankland v. Washington,* 5 Pet. 390, 8 L. ed. 166.
>
> "It is a fundamental rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument unless in cases where contracts are vitiated by fraud or mutual mistake, but this rule is too well understood and recognized to admit of doubt. *Northern Assurance Co. v. Grand View Bld'g Ass'n,* 183 U. S. 308, 46 L. ed. 213."

The United States Supreme Court denied a writ of *certiorari* in this case at 195 U. S. 636, 49 L. ed. 355.

In *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.,* 206 Fed. 813, the court said:

> "Where a corporation's officers applied for a receiver on an allegation in a petition that the corporation was insolvent, and the order appointing a receiver was based on the petition, parol evidence that the receiver was appointed, not on the ground that the corporation was insolvent, but to conserve its assets, was objectionable as contradicting the record."

The records of the receivership court are equally as indisputable that the conveyance was adversary and involuntary. The court, after reciting that the matter came on to be heard upon the application of the receivers (not the corporation) for such an order, ordered that the corporation "convey to said receivers all its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated," and directed the corporation's president "to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty." (Ex. L, P. R. pp. 200, 201.)

The conveyance was made in strict compliance with this order, and it recites "*that pursuant to the order of the Superior Court* * * * this day made and entered in the" receivership case, "Pacific Coast and Norway Packing Company, a corporation organized under the laws of the state of Minnesota, first party, does hereby sell, transfer and set over unto E. Schoenwald and S. T. Hills, *as receivers of the first party corporation and not otherwise,*" certain described personal property in Alaska including the power boat Bernice. (Ex. K, P. R. p. 198.)

Plaintiffs sought to impeach this (their) documentary evidence by oral testimony to the effect that the conveyance was not made by direction of the court, but was the voluntary act of the corporation. We submit that the record speaks for itself, showing absolutely that the conveyance was made by the corporation because the court ordered it after an application had been made for the order by the court's officers, the receivers; further, that the instrument itself shows that it was made to the officers of the court in their official capacity and *not otherwise.* The plaintiffs could not contradict the judicial records and instruments.

See:

*Haskell v. Cunningham, supra;*

*In re Bishop, supra;*

*Chappell v. Chappell, supra;*

*Nichols v. Doak, supra;*

*Blue Mountain, etc., Co. v. Portner, supra;*

*Doyle-Kidd, etc., Co. v. Sadler-Lusk Co., supra.*

It cannot be maintained that, if plaintiffs obtain the property in controversy, they will not be compelled to account for it or its proceeds to the court of whom they are officers. Their duty to do so is plainly prescribed by the order appointing them (P. R. p. 182); their bond is conditioned that they

do so (P. R. p. 183, Ex. D; P. R. p. 189, Ex. G). Furthermore, the supreme court of Washington recently said in *Ins. Co. v. Casualty Co.,* 159 Pac. (Wash.) 788, at 789:

> "The duties of a receiver are to take charge of, and safely keep and account for, *all of the assets* of the estate and to abide all orders of the court with reference thereto."

Moreover, it would be illogical that they could hold the property in Washington as assignees for the benefit of creditors, without accounting to their appointive court, when the conveyance was made to them in their official capacity and *not otherwise.* Under the laws of Washington, a receiver may set aside a voluntary assignment made for the benefit of creditors, regardless of whether any fraud was intended, as he is entitled to all of the assets of the estate (*Olson v. Bank,* 15 Wash. 148, 45 Pac. 734). It logically follows that the converse is true, *i. e.:* a receiver having been appointed, the corporation could not assign its property for the benefit of creditors and keep the receiver from taking them in his official capacity as receiver. There is no question that the corporation or at least its corporate officers in Washington could not assign its assets so as to prevent the receivers from taking title as receivers. (High Receivers, 4th ed., Secs. 346, 447, 448.) However, if the corporation had refused to make the conveyance as directed by the court, it, or at least its corporate officers in the jurisdiction of the Washing-

ton court, would have been in contempt of court. (34 Cyc. 215.)

The case at bar is even stronger than the facts in *Huntington v. C. & O. Ry.*, 98 Fed. 459. In that case there was an actual corporate resolution ratifying the assignment. In this case there is no record of any corporate act ratifying the assignment. In that case there was no application of the receiver for the transfer. In this case the order recites that it came on upon application of the court's officers, the receivers. In both cases the conveyance was made to the receivers in their official capacity, and in the case at bar the conveyance was worded "pursuant to the order of the court" and to the receivers and "not otherwise." In that case the action was instituted by a stockholder to wind the corporation up. In this case a creditor instituted the action and the corporation, according to the judicial records, which is the only competent evidence, actually appeared in court and resisted the petition and prayed that the action be dismissed and that it recover its costs. Under the circumstances the court will not inquire whether the corporation was more or less willing to convey all its assets to the receivers.

In that case (*Huntington v. C. & O. Ry.*, 98 Fed. 459) the court said, at pages 463, 464:

> "In form, the suit is adversary and involuntary, and it is not for this court to inquire whether the corporation was more or less willing

> or unwilling that the prayer of the complaint should be granted. The plaintiff had appealed to the court, and, if he had a good cause of action, the relief must necessarily be granted, whether resisted by defendant or not. This fact, and the form of the suit, settles its character. * * * The deed itself, by its terms and by being executed to the receiver in his official capacity, excludes any such idea as that it was executed as an original voluntary assignment for the benefit of the creditors of the company."

To the same effect, see: *Zacher v. Fidelity, etc., Co.*, 59 S. W. 493, 106 Fed. 593.

It is very evident that if the court in *Ward v. Connecticut Pipe Co.*, 41 Atl. 1057, had had before it the facts that exist in this case, *i. e.:* that a creditor (Nevin) had applied for a receiver, which application had been resisted, and the court, after a hearing, had granted the application, that it would have held the assignment to be involuntary, for it says:

> "If the assignment by the defendant to the receiver had been forced upon it at the instance of a creditor, this might have been an (in) *invitum* proceeding."

As it was, the case was decided upon the point that the receiver had been appointed upon a specific finding that it was for the best interests of the stockholders, in accordance with a statute which provided that upon a certain showing a stockholder might have the corporation wound up.

In *Young v. Clapp,* 32 N. E. (Ill.) 187, 189, rehearing denied in 35 N. E. 372, wherein the facts were: On same day eight judgments were entered on eight judgment notes; execution issued on each judgment, four of which were levied, and four returned *nulla bona;* three out of the last four judgment (execution) creditors filed creditor's bill and had receiver appointed; an order was also entered on same day requiring defendants to transfer and deliver their property to receiver, which was afterwards obeyed; the defendants filed no answer to the bill; the court said:

> "A transfer made by the judgment debtor to the receiver in a creditor's bill under the order of the court is not an assignment executed for the benefit of creditors, but rather for the payment of judgments owned by the complainants in the suit, subject to liens, if any, existing before the filing of the bill. By such transfer the receiver does not become the agent of the debtor for the distribution of the property in the sense in which the assignee becomes the agent of the assignor when there is a general assignment for the benefit of creditors."

But, as stated by the Supreme Court of the United States in *Security Trust Co. v. Dodd,* 173 U. S. at 635 (discussed more fully *infra*):

> "It makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law and derives from it his authority.

* * * It cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other states."
See also:

High Receivers, Sec. 240, p. 276;

*Catlin v. Wilcox Silver Plate Co.,* 24 N. E. 250.

(*C*) *Recognition will not be extended to foreign receiver when detriment is thereby caused to local creditors.*

This rule is stated so cogently by Mr. High in his work, both as to the principle and reason, that we quote it without further comment:

"The better doctrine upon the subject of extra-territorial powers of receivers undoubtedly is that the legal authority of a receiver is co-extensive only with the jurisdiction of the court appointing him and that as a matter of strict right, the courts of one state are not bound to recognize a receiver appointed in a foreign state. The rule is founded upon the recognized principle that the laws of one state have no force, *proprio vigore,* beyond the territorial limits of such state, although upon considerations of courtesy or comity they may be permitted to operate in another state for the promotion of justice, *when neither the latter state nor its citizens will suffer any inconvenience* from the application of the foreign law. The question then becomes one of comity between the different states, and it is upon such considerations alone that the courts of one state may recognize and enforce the acts

of a receiver appointed in another state, *when no detriment is thereby caused to the citizens of the state* in which the functions of the foreign receiver are asserted."

High Receivers, 4th ed., Sec. 47;

*Hoyt v. Thompson,* 5 N. Y. 320.

The cases which are consonant with this doctrine are multitudinous. We cite some of them:

34 Cyc. 488, 489, 490, 491;

Cook on Corporations, Sec. 871;

*Commercial Nat. Bank v. Matherwell,* 31 S. W. 1002;

*Grogan v. Egbert,* 28 S. E. 715;

*Fawcett v. Iron Hall,* 29 Atl. 914;

*Failey v. Fee,* 34 Atl. 842;

*Stockbridge v. Beckwith,* 33 Atl. 620;

*Frowert v. Blank,* 54 Atl. 1000;

*Frowert v. Blank,* 49 Atl. 302;

*Linville v. Madden,* 41 Atl. 1097;

*Irwin v. Association,* 38 Atl. 680;

*Lackmann v. Supreme Council,* 75 Pac. (Cal.) 583;

*Humphreys v. Hopkins,* 22 Pac. (Cal.) 893;

*Thum v. Pingree,* 61 Pac. (Utah) 18;

*Ward v. Ins. Co.,* 67 Pac. (Cal.) 124;

Beach on Receivers, Sec. 267, 268;

*Fowler v. Osgood,* 141 Fed. 20;

*Wigton v. Bosler,* 102 Fed. 71;

23 Am. & Eng. Encyc. 1107, 1108, 1123;

*Hieronymons Bros. v. Ins. Co.,* 60 So. 452;

*Coal, etc., Co. v. Reherd,* 204 Fed. 859, 882;

*Fairview, etc., Co. v. Ulrich,* 192 Fed. 894;

*Hazelett v. Woodhead,* 67 Atl. 136;

*Booth v. Clark,* 15 L. ed. (U. S.) 164;

Modern Am. Law, Vol. 9, p. 480.

(*D*) *Foreign statutable assignments for benefit of creditors, whether voluntary or involutary, will be given no effect as against local creditors.*

The rule is in actuality even stronger than that stated by us, as the decisions of the United States Supreme Court are that such assignments will not be given effect as against any creditors pursuing their remedies in the state where it is sought to be enforced. The reason of the rule is plain: the enforcement is only by virtue of comity, as the laws of the foreign state have no force outside its boundaries, and comity does not require any government

to impair the remedies or lessen the securities of its own citizens.

While there is an abundance of authority, the rule is clearly stated in *Security Trust Co. v. Dodd,* 173 U. S. 624, which case is more fully discussed *infra,* wherein the court said:

> "The prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such state permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. Nor as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated. As was said by Mr. Justice McLean in *Oakey v. Bennet,* 11 How. 33, 44, 'A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens.' And this is the prevailing doctrine of this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment. * * * the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary ap-

plication of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority."

12 Enc. of U. S. Sup. Ct. Repts. 627.

This case was approvingly quoted in *The Disconto Gesellschaft v. Umbreit,* 208 U. S. 570, 52 L. ed. 628, 629.

Other cases to the same effect are:

*Happy v. Prickett,* 64 Pac. (Wash.) 528;

*In re Waites,* 2 N. E. (N. Y.) 440;

*Bloomingdale v. Weil,* 70 Pac. (Wash.) 95, at 101;

4 Cyc. 227;

*Taylor v. Ins. Co.,* 96 Mass. 354, 14 Allen 354;

*Catlin v. Wilcox-Silver Plate Co.,* 24 N. E. 250;

*Olney v. Tanner,* 10 Fed. 104;

Burrill on Assignments, pp. 363, 367;

*Chaffee v. Bank,* 36 Am. Rep. 345;

*McClure v. Campbell,* 37 N. W. (Wisc.) 343;

2 R. C. L., Assignments for Benefit of Creditors, Sec. 42.

*(E) An assignment for benefit of creditors made pursuant to an order of court in a receiver or foreign insolvency proceedings will, as against local creditors, be given only the same effect as would be given to the proceedings themselves, i. e.: it will not be enforced to the detriment of local creditors.*

We urge that, even without the support of authorities, this proposition logically follows from the facts and authorities discussed in subheadings *B, C* and *D*. However, it is supported by respectable authority, as it is reasonable that a conveyance made pursuant to an order could have no wider extra-territorial effect than the order itself; and that the order could have no wider effect than the proceedings of which it was a part. In other words, that the conveyance would simply be a part of the proceedings of the foreign court and would be limited the same as the proceedings upon which it depended.

Mr. High in his work on Receivers says:

> "Nor in such case, does the fact that the firm has executed an assignment of all its effects to the receiver vary the rule, since such assignment, as against non-resident creditors, confers upon the receiver no better title than that acquired under the order appointing him."

High Receivers, p. 276, Sec. 240 (4th ed.), also p. 629;

*Catlin v. Wilcox-Silver Plate Co.,* 24 N. E. 250, *supra.*

In 34 Cyc. at page 493 it is said:

> "Rights of creditors to proceed in a state other than that in which the receiver was appointed are not affected by involuntary assignments executed under the orders of the appointing court, and such receivers will not be recognized to defeat the preference of such creditors." See also:

*Huntington v. C. & O. Ry.*, 98 Fed. 459, *supra;*

*Zacher v. Fidelity, etc., Co.*, 59 S. W. 493, 106 Fed. 593, *supra.*

*(E) Comity will not be extended in any event when it is not reciprocated.*

There is a further serious and fatal defect in plaintiffs' position, and that is: That if the facts were reversed and McDonald stood in his present position, but was a citizen of Washington, and the plaintiffs stood in their present position, but were citizens of Alaska, and the proceedings under which they assert their claim had been had in Alaska, then the plaintiffs would not be accorded by the Washington courts that which they now claim the Alaska courts ought to extend to them.

In *Happy v. Prickett*, 64 Pac. (Wash.) 528, at 531, the court said:

> "But we think that the great weight of authority, as well as the better reasoning, is in favor of the conclusion that rights under statut-

able assignments will be protected in a foreign state, *subject to the rights of local creditors.*"

It is true the Washington supreme court reversed the decision of the trial court, but it was on the ground that the local creditor should be obliged to prove that he had a just claim. In this case plaintiffs admit that McDonald has a just claim against the corporation. (Complaint and Reply, P. R. pp. 12 and 23.)

In a more recent decision, the Washington supreme court reiterated this doctrine in even more strong language, saying:

> "We think, however, that the supreme court of the United States and the cases referred to in the case of *Barnett v. Kinney* * * * lays down a better rule and that *foreign creditors should not be accorded* the same rights as to local creditors simply because they have availed themselves of the process of the courts of our state to seize the property of the insolvent within the state. We do not think that there is any substantial difference between the assignments of real and personal property, and we so intimate in *Happy v. Prickett, supra. The rights of local creditors prevail against foreign assignments,* and, *in addition,* as said in *Trust Co. v. Dodd, supra,* such assignments must not conflict with the laws or public policy of the state in which the assignment is sought to be enforced. If it does, it is a good reason for refusing to extend the comity of the state in favor of such conveyance."

*Bloomingdale v. Weil,* 70 Pac. (Wash.) 95. *loc. cit.* 101.

Under such circumstances, the courts of Alaska certainly should not extend their comity to such an extent as to prejudice the rights of local creditors in Alaska.

In *Hale v. Allison,* 188 U. S. 56, p. 71, 47 L. ed. 380, the Supreme Court of the United States said:

> "The question of comity cannot avail in a case where the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the state of his appointment."

A case decidedly in point is *In re John L. Nelson & Bro. Co.,* 149 Fed. 593, wherein the court said:

> "It appears to be firmly established in Illinois that, even in the case of a voluntary foreign assignment, it is contrary to the policy of Illinois law to allow the property or funds of a non-resident debtor to be withdrawn from that state before his creditors residing there have been paid, and thus compel them to seek redress in a foreign jurisdiction. And these decisions have been recognized by the federal courts sitting in Illinois. It thus appears that, were the situations reversed, a New York assignee would not be permitted to recover funds of his assignor situated in Illinois as against attaching creditors in that state. The rule of granting to assignments for the benefit of creditors extraterritorial vitality rests upon principles of comity. *Faulkner v. Hyman,* 142 Mass. 54. It involves reciprocity, and it appears to me to be clearly against the policy of any state to grant to the citizens of another jurisdiction a priv-

ilege from which its own citizens are debarred by the repeated decisions of the highest court of said jurisdiction. I am, therefore, of opinion that, upon principles of public policy, the claims of the attaching creditors are to be preferred to that of the assignor."

## II.

## VOLUNTARY OR COMMON-LAW ASSIGNMENTS FOR BENEFIT OF CREDITORS WILL NOT BE RESPECTED IN OTHER STATES WHEN THEY COME IN CONFLICT WITH THE RIGHTS OF LOCAL CREDITORS, OR WITH THE LAWS OR PUBLIC POLICY OF THE STATE IN WHICH THE ASSIGNMENT IS SOUGHT TO BE ENFORCED.

(A) *Voluntary or common-law assignments receive recognition in other states only as a matter of comity.*

Before proceeding with the argument, it is well to call attention to the clearly demonstrated fallaciousness of plaintiffs' contention. Plaintiffs assert that a common-law assignment is valid in both Washington and Alaska, and that therefore such an assignment made in Washington conveys personal property everywhere (in this case, in Alaska), on the theory that the situs of the personal property is the domicile of the owner. However, in the face of this contention, plaintiffs admit that the Pacific Coast & Norway Packing Company is a citizen of the state of Minnesota (Complaint, P.

R. p. 1) and not of the state of Washington. The domicile of the corporation thus being Minnesota, we submit that plaintiffs' argument, if otherwise good, would have to be based upon the fact that the assignment was a common-law assignment good in Minnesota. This, however, they nowhere claim.

The plaintiffs in the case are seeking to take personal property out of Alaska and into Washington, and they say that when they ask the Alaska courts to grant them this that they are not asking the court to exercise or extend comity. However, the recognition in a foreign state of even such an assignment as plaintiffs claim is a *"mere principle of comity"* and *"after all, there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed."*

> *Green v. Van Buskirk,* 5 Wall. 307, 16 L. ed. 599.

This doctrine has been reaffirmed by a recent well-considered case of the Supreme Court, which will be fully referred to hereafter, wherein Mr. Justice Day, speaking for a unanimous court, said:

> "But what property may be removed from a state and subjected to the claims of creditors of other states is a matter of comity between nations and states, and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction."

*The Disconto Gesellschaft v. Umbreit,* 208 U. S. 570; 52 L. ed. 628.

This is the identical situation in the case at bar, i. e.: plaintiffs are endeavoring to remove the vessel Bernice, or the proceeds from the sale of her, to Washington, there to be subjected to the claims of creditors of other states than Alaska. We respectfully submit that the trial court in Alaska was bound to follow the controlling weight of authorities from the United States supreme court, regardless of state decisions; and that the matter involved is clearly a matter of comity.

(B) *Comity will not be extended to the recognition of common-law or voluntary assignments to the prejudice of local creditors.*

Although we maintain that the transfer in question was an in invitum proceeding and was made because ordered to be made in the receivership proceedings of which it was a part, and that the corporation had no alternative than to obey the order, at the same time, even if the transfer were a voluntary or common-law assignment, it would not be respected when it came in conflict with the rights of local creditors, or with the laws or public policy of the state where sought to be enforced.

Plaintiffs cite cases which they claim support a contrary doctrine than that just announced. However, the facts in many of their cited cases are in-

herently different from the facts in the case at bar. In *Bank v. Lounge Co.,* 47 N. E. 846; *Clark v. Peat Co.,* 35 Conn. 303; *Moore v. Land Co.,* 33 Atl. 641; and in *Roberts v. Norcross,* 45 Atl. 561, the thing attached is indicated in the decision to have been a debt, which was payable in the state of the assignment. In the last named case the rights of a local creditor were not involved. In *Johnson v. Sharp,* 31 Ohio St. 617, the assignment was prepared in Ohio in accordance with the Ohio statute and ran to an Ohio creditor, and was executed outside of the state simply because the assignor was not in Ohio. In *Byers v. Tabb,* 25 So. 492, and *Atherton v. Ives,* 20 Fed. 894, the local attaching creditor had actual notice of the assignment; and in *Van Wyck v. Read,* 43 Fed. 716, the note assigned was actually in New York, the place of the assignment, and further the note was assigned over by endorsement.

There is a vast distinction between such facts and the facts in the case at bar. In the latter plaintiffs admit that the personal property has been at all times involved in Alaska (Reply, P. R. p. 23; Dep. Smith, P. R. p. 100; Dep. Kells, P. R. p. 74; Dep. Schoenwald, P. R. p. 158), and that it has not been during any of those times in the state of Washington (Dep. Smith, P. R. p. 100; Dep. Steberg, P. R. p. 85; Dep. Kells, P. R. p. 74; Dep. Schoenwald, P. R. p. 158), and that Minnesota is the home of the corporation (Complaint, P. R. p. 1), and that

McDonald had no notice of the assignment (Ev. Burton, P. R. pp. 136, 142, 143, 144 and 147.)

However, although cases from state courts may exist pro and con on the question, neither argument nor discussion can avail the plaintiffs, as the rule has been well settled by the United States Supreme Court in *Security Trust Co. v. Dodd,* 173 U. S. 625, in which case at least five of the cases relied on by plaintiffs were before the court and were, in fact, referred to in its unanimous opinion. It is significant to note that the corporation assignor in that case was a citizen of Minnesota the same as the corporation in the case at bar, which is worth bearing in mind in connection with the facts which were as follows:

Merrill Company, having become insolvent and unable to pay its debts in usual course of business, made assignment under laws of Minnesota to plaintiff Security Trust Co. on September 23, 1893. Security Trust Co. as assignee disposed of all Minnesota property for benefit of creditors. Merrill Company was indebted to Dodd, Mead & Co. of New York; also to Mudge & Sons, a Boston partnership. Mudge & Sons assigned their claim to Dodd, Mead & Co. Prior to assignment Merrill Company was owner of personal property for the value of which suit in controversy was brought, which property was in custody and possession of Mudge & Sons in Boston. Mudge & Sons were in-

formed of the assignment prior to March 8, 1894, and at about that date a notice was served on them by one Merill (an individual) to the effect that he took possession of the property in their custody for and on behalf of the assignee Security Trust Co. Dodd, Mead & Co. had full knowledge of the execution and filing of the assignment by Merrill Company to Security Trust Co. On March 8, 1894, Dodd, Mead & Co. commenced action against Merrill Company in Massachusetts upon their indebtedness and seized by attachment the property in custody of Mudge & Sons, which property was later sold to the execution creditors Dodd, Mead & Co.

The Circuit Court of Appeals certified to the Supreme Court the following questions:

> "First: Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the State of Massachusetts, and in the custody and possession of said Mudge & Sons?
>
> "Second: Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under pro

> cess issued by the superior court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the state of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

The Court ,speaking through Mr. Justice Brown, at pages 628 and 629 of 173 U. S., said:

> "The operation of *voluntary or common-law assignments* upon property situated in other states has been the subject of frequent discussion in the courts, and there is a general concensus of opinion to the effect that *such assignments* will be respected, *except* so far as they come *in conflict with the rights of local creditors*, or with the laws or public policy of the state in which the assignment is sought to be enforced."

The Court then went on and further said that statutable assignments would only be given such effect as the laws of the state in which it was sought to be enforced would permit. The Court made no distinction between voluntary and common-law assignments, and apparently considered that they had no differentiating qualities at least in their effect in another state, as it says that such assignments will be respected except under three circumstances: 1. when they come in conflict with the rights of local creditors; 2, when they come in conflict with the laws; and, 3, when they come in conflict with the public policy.

In consideration with this case it should be borne in mind that McDonald was a local (Alaskan) creditor (Dep. Steberg, P. R. 88); that he at no time favored the transfer (Dep. Smith, P. R. p. 98); and that he has not at any time been a party to, or in any manner acquiesced in or assented to, instigated, endorsed or ratified, or received any advantage or benefit whatsoever flowing from said receivership and assignment, or either of them, and that neither of the defendants had any notice of the conveyance. (P. R. p. 219, finding No. 13, which plaintiffs do not urge as erroneous, and we therefore urge must be deemed correct.)

Although the trial court's interpretation of *Security Trust Co. v. Dodd, supra,* is criticized by plaintiffs, a similar interpretation has been placed upon it by some very eminent authorities.

The authors of the Encyclopedia of United States Supreme Reports, in volume 2 ,at page 626, so reported it.

The author of Cook on Corporations (6th ed. Vol. 3, Sec. 871, p. 3098, note 1) likewise so interpreted it.

See, also, to the same effect:

*Smith v. Burz,* 125 Ill. App. 122;

*Sheldon v. Wheeler,* 32 Fed. 773;

*Shinler v. Israel,* 27 Fed. 857;

3 *Am. & Eng. Enc.* (2d ed.) 49;

*Faulkner v. Hyman,* 6 N. E. (Mass.) 846.

And in *Bank v. McLeod,* 38 Ohio St. R. 182, the court said:

> "The courts of Ohio, while allowing the comity of suit on a contract not in contravention of our laws or public policy, will protect the rights of our own residents and will not allow the principle of comity to impede or impair those rights."

Plaintiffs assert that if the Supreme Court held in *Security Trust Co. v. Dodd, supra,* as interpreted by the trial court, in any event the ruling has been repudiated by the later case of *Blake v. McClung,* 176 U. S. 59, which they cite in connection with *Sully v. Am. Nat. Bank,* 178 U. S. 289, and *Maynard v. Granite, etc., Ass'n,* 92 Fed. 435, on the theory, we take it, that to give defendant McDonald a right to enforce his remedies by means of the vessel Bernice would be unconstitutional because he might obtain a larger pro rata of his debt than some other creditor, say, in Washington. The cases cited by plaintiffs are easily distinguishable from the cases consonant with the decision of the trial court.

In the former, a state passed a law in effect that no non-resident should receive any part of his debt out of the corporation's property situated in the state until the citizens of the state were paid in full, which is virtually saying that non-residents shall not be allowed to use the local courts.

In the latter, the rule is that a foreigner shall not come into a state and take the corporation's property, upon which the local creditor may have extended his credit, away from the state and into a foreign jurisdiction, thus compelling the local creditor to go into a foreign jurisdiction to obtain payment of his debt, without first giving him an opportunity to enforce his remedies through the courts of his own state against the property in his own state.

However, if the Supreme Court did intend by *Blake v. McClung, supra,* to repudiate its opinion in *Security Trust Co. v. Dodd, supra,* it can be confidently asserted that the doctrine of the latter case has now been re-established by the comparatively recent case of *The Disconto Gesellschaft v. Umbreit,* 208 U. S. 570; and if it can be said with propriety that *Blake v. McClung* overruled *Security Trust Co. v. Dodd,* then it can be said with equal propriety that *Blake v. McClung* has been overruled by *The Disconto Gesellschaft v. Umbreit.* The facts in the last named case were as follows:

Plaintiff, a German corporation, commenced action against debtor in Wisconsin on August 17, 1901, and garnisheed funds in bank on same date; judgment was rendered in favor of plaintiff in that action on February 19, 1904; plaintiff on August 21, 1901, was appointed a member of commtitee of creditors of debtor in bankruptcy proceedings in

Germany; plaintiff's claim, though presented, had not been paid by bankruptcy estate.

Defendant, a citizen and resident of Wisconsin, commenced suit on March 21, 1904, against debtor for recovery of services rendered between August 16, 1901, and February 1, 1903; he garnisheed funds in same bank on March 22, 1904.

Defendant's claim, therefore, arose after plaintiff had attached, and defendant's attachment was nearly three years after plaintiff's.

The Supreme Court of the United States, speaking through Mr. Justice Day, at pages 628 and 629 of 52 L. ed. (208 U. S. 570), said:

> "But what property may be removed from a state and subjected to the claims of creditors of other states is a matter of comity between nations and states, and not a mater of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.
>
> " 'Comity' in the legal sense,' says Mr. Justice Gray, speaking for this court in *Hilton v. Guyot*, 159 U. S. 113, 163; 40 L. ed. 95, 108, 'is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one national allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'

"In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation, and extent of comity between nations and states. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to *prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction.* Such recognition is not inconsistent with the moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine, Mr. Justice Story says: 'Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasion on which its exercise may be justly demanded.' Story, Confl. L. Par. 33.

"The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other states as *against the demands of local creditors, by attachment* or otherwise in the state *where the property is situated.* The cases were reviewed by Mr. Justice Brown, delivering the opinion of the court in *Security Trust Co. v. Dodd,* 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other states as to property therein situate, *except* so far as they come in *conflict with the rights of local creditors,* or with the public policy of the state in which it is sought to be enforced; and, as

was said by Mr. Justice McLean in *Oakey v. Bennett*, 11 How. 33, 44; 13 L. ed. 593, 597, 'national comity does not require any government to give effect to such assignment (for the benefit of creditors) *when it shall impair the remedies or lessen the securities of its own citizens.*'

"There being, then, *no provision of positive law* requiring the recognition of the right of the plaintiff in error to appropriate property in the state of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the state permitted such recognition was a matter for the state to determine for itself. In determining that the policy of Wisconsin would not permit the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the state, the supreme court of Wisconsin has done no more than has been frequently done by nations and *states* in refusing to exercise the doctrine of comity in such wise as to impair the rights of local creditors to subject local property to their just claims. We fail to perceive how this application of a *well-known rule* can be said to deprive the plaintiff in error of its property without due process of law."

It occurs to us that this case is a complete answer to plaintiffs' contention. There is no contention that McDonald does not have a just claim against the corporation, and the pleadings admit that the property was duly attached by defendant Bishop in an action brought by defendant McDonald against the corporation, and that McDonald duly obtained a judgment, and that said judgment order-

ed and adjudged that the property be sold by Bishop as Marshal to satisfy the demands of McDonald (Answer, Par. 2, 3 and 4, P. R. pp. 11, 12 and 13; no denial in the reply, P. R. p. 23). The judgment was in accordance with the code of civil procedure provided by Congress for Alaska, Sec. 979, C. L. A., Carter Code, Sec. 147, providing:

> "If judgment be recovered by plaintiff, and it shall appear that the property has been attached in the action and has not been sold as perishable property or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, * * *."

McDonald is a local creditor (Dep. Steberg, P. R. p. 88); and if plaintiffs prevail his remedies on his just claim will be impaired and his securities, i. e., attachment and judgment liens, will be entirely destroyed, and there is no provision of positive law in Alaska requiring the recognition of plaintiffs' alleged right to take the property to Washington and there distribute it for the benefit of non-Alaskan creditors.

As said by the supreme court of Washington, in a case where no rights of local creditors were involved, but in which a voluntary assignment made in New York was in controversy:

> "Foreign creditors should not be accorded the same rights as *those accorded* (italics ours) to local creditors simply because they have avail-

ed themselves of the process of the courts of our state to seize the property of the insolvent within the state. * * * *The rights of local creditors prevail* against foreign assignments, and *in addition,* as said in *Trust Co. v. Dodd, supra,* such assignments must not conflict with the laws or public policy of the state in which the assignment is sought to be enforced."

*Bloomingdale v. Weil,* 70 Pac. (Wash.) 94, at 101.

We firmly maintain that it would not be just or fair to compel McDonald to relinquish his attachment and judgment liens and to go forth into the foreign state of Washington in order to obtain payment of his just claim, or a portion of it. This position is supported by respectable authority.

"It is not just or fair to compel creditors in this state to go to a foreign state to receive a pro rata share of the debtor's property when they have extended credit alone upon the faith of the property in this state."

*Whithed v. Thompson Co.,* 86 Ill. A. 76, 56 N. E. 1106; 185 Ill. App. —, 76 Am. S. R. 51.

To the same effect, see:

*Woodard v. Brooks,* 128 Ill. 222; 20 N. E. 685;

*Bizzell v. Bedient,* 4 N. C. 219, 2 L. R. 254.

34 *Cyc.* 505.

Moreover, as said by the Court in *Baldwin v. Hosmer,* 59 N. W. 437:

> "The rule of comity is never allowed to operate when it will contravene the rights of a citizen of the state where the action is being taken."

To the same effect, see:

*Hilton v. Guyot,* 159 U. S. 113, 40 L. ed. 95;

*Fransen v. Zimmer,* 90 Hun. 103;

*Modern Am. Law,* Vol. 9, p. 475.

## III.

## AN UNRECORDED ASSIGNMENT (FOR BENEFIT OF CREDITORS) OF AN AMERICAN VESSEL IS INVALID AS AGAINST A CREDITOR OF THE ASSIGNOR WHO SEEKS TO SEQUESTER THE PROPERTY TO THE SATISFACTION OF HIS DEBT.

However, even if the contention of defendants was not supported by such eminently respectable and weighty authority as enunciated, still the plaintiffs would not be entitled to recover because they failed to record their conveyance in accordance with the Revised Statutes of the United States.

(A) *The property involved was an American licensed vessel, documented and licensed in the Customs District of Alaska.*

The plaintiffs admit that the "Bernice" was at all times involved in the controversy an American licensed vessel of *eleven* net tons, documented and licensed in the United States Customs District of Alaska (See answer, P. R. pp. 11 and 12; reply, P. R. p. 22, as to no denial).

Now, there is no essential distinction between vessels of 5 and 20 tons burden and vessels of over 20 tons burden; in fact, they both are given the same privileges with relation to the coasting trade or fisheries by Section 4311, R. S., U. S., which provides:

> "Vessels of 20 tons and upward, enrolled in pursuance of this Title, and having a license in force, or vessels of less than 20 tons, which, although not enrolled having a license in force, as required by this Title, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries."

Further, it is apparent that no vessel of less than 5 tons can be licensed, and, in fact, the same provisions as to measurement are required of licensed vessels as in registered or enrolled vessels.

> "Before any vessel, of the burden of 5 tons, and less than 20 tons, shall be licensed, the same measurements shall be made of such vessel, and the same provisions observed relative thereto, as are to be observed in case of measuring vessels to be registered or enrolled. * * *
>
> Sec. 4331, R. S., U. S.

By the act of Congress of Feb. 29, 1912, Ch. 47, the document of enrollment and license is consolidated into one form.

> "That under the direction of the Secretary of Commerce and Labor the Commissioner of Navigation is hereby authorized and directed from time to time to consolidate into one document in the case of any vessel of the United States the form of enrollment prescribed by Sec. 4319 of the Revised Statutes and the form of license prescribed by Sec. 4321 of the Revised Statutes, and such consolidated form shall hereafter be issued to a vessel of the United States in lieu of the separate enrollment and license now prescribed by law, and shall be deemed sufficient compliance with the requirements of laws relating to the subject."

37 Stat. L. 70.

It being admitted that she is an American licensed vessel, we submit that it must be conceded that she must be classed as an enrolled and licensed vessel, because "American vessels are of two classes: those registered, and those enrolled or licensed."

*Anderson v. S. S. Co.,* 225 U. S. 187; 25 L. ed. 1047, at 1053;

and being an American licensed vessel that her status is fixed and she comes within the purview of Section 4192, R. S., U. S., which provides:

> "No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his

> heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled. * * *

In *Fleming v. Sloane,* 110 N. W. (Mich.) 933, the Court said, at page 935:

> "The status of the Hattie as a vessel of the United States depends upon registry, license, and enrollment, under the statutes cited, and not upon the uses that she may be put to or the accident of idleness. Being a vessel of the United States, her status is fixed, and interested persons may depend upon the record of mortgages in the collector's office."

(B) *The transfer was not recorded and the defendants had no actual notice thereof, and it is therefore void as against an attaching creditor.*

Plaintiffs admit that the transfer was not recorded in the office of the collector of customs for the District of Alaska (Dep. Kells, P. R. p. 75; Dep. Smith, P. R. p. 100); and in fact, the record is bare of any proof that the transfer was ever recorded in any customs district. [Indeed, it is evident that plaintiffs could never hope to controvert the fact that the transfer was not recorded in any custom house as the witness Kells, in an answer which was stricken (P. R. p. 111) says: "no record of the bill of sale was made in the custom house."]

There is likewise an absolute want of proof that the defendants had any notice or knowledge of the

transfer, although plaintiffs' counsel, Mr. Burton, attempted to impute notice to defendants' counsel, Robertson; but, in asmuch as Mr. Burton says, in effect, that he didn't know of the actual execution of the transfer until at least after the attachment proceedings (Ev. Burton, P. R. p. 142), we fail to see how he could have given either actual or constructive notice to Robertson of a fact that he didn't know himself. Furthermore, Mr. Burton says, in effect, that he didn't tell Robertson the property had been transferred (P. R. pp. 136, 144, 147 and 148).

With this state of facts, we think the case is clearly within the rule laid down by the supreme court of the state of Washington, in 1913, in speaking of the section of the Revised Statutes now under discussion, towit:

> An unrecorded bill of sale is invalid as against a creditor of the vendor who seeks to sequester the property to the satisfaction of the debt, the phrase any person including the general creditors of the vendor. Recording statutes are remedial and must be liberally construed so as to attain the object intended by them.

*Benner v. Sc. Am. Bank,* 131 Pac. 1149;

*Potter v. Irish,* 10 Gray 416, 76 Mass. 416;

Also,

*Secrist v. German Ins. Co.,* 19 Ohio St. R. 476;

(C) *An assignment for the benefit of creditors is a conveyance within the purview of Section* 4192, *R. S., U. S.*

Plaintiffs' contention that the transfer is an assignment for the benefit of creditors does not cure their failure to record it, as such an assignment is held to be a conveyance within the purview of the section of the Revised Statutes under discussion.

*Haug v. Bank,* 43 N. W. (Mich.) 939, at 941.

## CONCLUSION.

In conclusion, first calling attention to the well considered opinion of the trial court (P. R. p. 226), we earnestly urge that the plaintiffs are not entitled to prevail on five grounds, the first three of which are included within Point I hereinbefore stated. In brief, these grounds are:

1. The gravamen of plaintiffs' complaint is that they hold a valid title to the property, and the burden was upon them to prove this. However, there was an absolute want of proof that they hold a valid, duly authorized title; in fact, the only competent evidence in the case shows that the transfer was not the corporate act of the corporation.

2. The transfer is a part of an adversary, in invitum proceedings and is in invitum itself, and it will be given only such effect in other states as the laws of such states permit, and must give way to claims of creditors pursuing their remedies there.

3. The courts of the territory of Alaska are not required and ought not be requested to extend comity to citizens of Washington in cases where, if the situations were reversed, the courts of Washington would not extend similar comity to the citizens of Alaska.

4. The transfer, even if it be a voluntary or common-law assignment for benefit of creditors, which we do not concede, will not be respected in other states when it comes in conflict with the rights of local creditors, or with the laws or public policy of the state in which it is sought to be enforced.

5. A conveyance of an American licensed vessel of the description of the vessel in question must, to be valid against general creditors, be duly recorded in the office of the Collector of Customs, unless those creditors have actual notice of said conveyance, which the evidence in this case discloses neither of the defendants had.

In addition to these grounds, the attention of the Court is respectfully called to the fact that there is no contention that the defendant McDonald was not pursuing his remedies on a just claim in accordance with the laws of his own territory, nor is there any contention but that, if the plaintiffs prevail, McDonald will be deprived of those remedies and his securities will be entirely taken away from him.

In the light of the record and of the decisions cited, we earnestly maintain that no prejudicial error or injury was sustained by the plaintiffs, and that it would be unfair and unjust to permit them to prevail as against the defendants. We submit that justice and equity are in union in demanding that the judgment of the trial court be upheld, and we respectfully pray that it be so ordered.

Respectfully submitted,

GUNNISON & ROBERTSON,

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